FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992	))))	MB Docket No. 05-311

COMMENTS OF THE CITY OF NEW YORK

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I. INTRODUCTION

The City of New York ("the City") submits these comments in response to the Second Further Notice of Proposed Rulemaking ("FNPRM") issued by the Federal Communications Commission ("the Commission" or "the FCC") in the above-listed proceeding. As described below, the FNPRM's proposed rulings regarding the deductibility of certain amounts from franchise fees collectible by franchise authorities ("FAs") and regarding "mixed-use facilities", if ultimately adopted by the Commission would be arbitrary and capricious, and would be inconsistent with the relevant federal statutory language, with the Congressional intent of such language, with past precedent, and with the public interest. Thus, such proposed rulings, if adopted as described in the FNPRM, would be not only ill-considered but also illegal as extending beyond the authority of the Commission.

II. FRANCHISE REQUIREMENTS AND FRANCHISE FEES.

The Commission's proposed rule regarding the deductibility of certain amounts by franchisees from franchise fees payable to FAs would if adopted be *ultra vires* as inconsistent with the Cable Act[1] and Congressional intent, would contradict longstanding precedent, and would be inconsistent with the public interest.

A. <u>The FNPRM's Proposal Is Inconsistent With The Meaning of "Franchise Fee" in Section 542 As Unambiguously Described in Legislative History.</u>

The Report of the Energy and Commerce Committee of the House of Representatives on the Cable Act[2] includes the following explanation of Section 542, the franchise fee section of the Cable Act: *"In general, this section defines as a franchise fee only monetary payments made by the cable operator and does not include as a 'fee' any franchise requirements for the provision of services, facilities and equipment."*[3] The FNPRM proposes a rule[4] which would take this unambiguously expressed legislative intent and turn it completely on its head, replacing a policy mandated by statute.

The FNPRM purports to justify this statute-defying proposal by distorting beyond recognition the import of the series of regulatory and judicial decisions leading up to and including last year's Sixth Circuit Court of Appeals decision in *Montgomery County v. FCC*.[5]

It can be reasonably gathered from this sequence of decisions that there is a very narrow scope of potential non-cash franchise agreement requirements, unrelated to a cable operator's cable system or to its core competencies, that if imposed on a cable operator in a cable TV franchise

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[1] The "Cable Act", as that term is used herein, is defined as 47 USC §§522 through 573. Individual sections of the Cable Act are referred to hereinafter by their U.S. Code section number, for example, 47 USC §522 is referred to as "Section 522", etc..

[2] H.R. Rep. No. 98-934 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655 ("*House Committee Report*")

[3] *House Committee Report*, p. 65.

[4] FNPRM, ¶24

[5] Report and Order and Further Notice of Proposed Rulemaking, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act* (March 5, 2007) 22 FCC Rcd 510 ("*First Order"*); Second Report and Order, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act (*November 06, 2007) 22 FCC Rcd 19633 ("*Second Order*"); Second Report and Order on Reconsideration, *In the Matter of Implementation of Section 621(a)(1) of the Cable Communications Policy Act* (January 21, 2015) 30 FCC Rcd. 810 ("*Recon Order*"); *Alliance for Community Media v. FCC,* 529 F.3d 763 (6th Cir. 2008); *Montgomery County v. FCC* 863 F.3d 485 (6th Cir. 2017) *(*"*Montgomery County*")

contract, would be treated as tantamount to a monetary franchise fee for purposes of determining whether the total franchise fee required by such contract is within the 5% cap mandated by Section 542. The *House Committee Report* included a list of the type of *monetary* grant requirements intended to be treated as within the definition of a "franchise fee" for purposes of calculating the 5% cap: "lump sum grants not related to PEG access for municipal programs such as libraries, recreational programs, detention centers"[6]. Although this list references monetary grants, it would not be unreasonable to assume that a cable franchise contract requirement that a cable operator purchase a site to be used as a library or a recreation or detention center, and then turn over the space to the FA, could be treated as tantamount to, essentially the equivalent of, a monetary grant.

These examples from the legislative history have a key characteristic in common: they are services that do not use the cable operator's cable system or other communications facilities ("CF") or call on the core competencies ("CC") of the cable operator (requirements that do use such facilities or core competencies can be referred to as "CF/CC requirements). Requirements that are not CF/CC requirements would merely require the cable operator to use solely its *monetary* resources, and no other resources such as its system or its special expertise, to purchase something and simply turn over the purchased item to the FA. These very specific characteristics support the interpretation that a non-CF/CC requirement in a cable franchise agreement is tantamount to a monetary payment to the FA in another form, consistent with the statutory intent reflects the understanding of "franchise fee" as *monetary* in nature. The sole aspect of such requirement that connects it to a cable operator is that the cable operator's money is being spent. The Commission's decisions in the First Order, the Second Order and the Recon Order (to the extent this last was

[6] *House Committee Report*, p. 65.

upheld by *Montgomery County*) are consistent with this unambiguous understanding of the Section 542 and the expressed legislative intent of that statute.

But the FNPRM now proposes to expand this very narrow exception and inflate it beyond recognition, such that the proposed exception would effectively swallow the entire original Congressional intent as expressed in the *House Committee Report*[7].

B. <u>The FNPRM's Proposal Would If Adopted Be Redundant and Is Contrary To the Statutory Scheme.</u>

The FNPRM claims at ¶17: "Likewise if in-kind cable-related contributions unrelated to the provision of cable services are not counted as franchise fees, LFAs could circumvent the five percent cap by requiring, for example, unlimited free or discounted cable services and facilities for LFAs, in addition to a five percent franchise fee."

That is an inaccurate claim with respect to both incumbent franchisees and new entrants.

1. <u>Incumbents</u>.

The criteria applicable to renewal determinations for existing franchises include "whether the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests."[8] The boundaries of this criteria were the Cable Act's express method to protect incumbent providers against FAs imposing requirements for "unlimited free or discounted cable services and facilities", and other franchise requirements that go beyond those that are "reasonable", "cable-related" requirements "taking into account the costs of meeting such needs and interests". It would be both redundant

[7] To repeat, the general rule for understanding the definition of "franchise fee", as expressed in the House Committee Report: "In general… [Section 542] defines as a franchise fee only monetary payments made by the cable operator and does not include as a 'fee' any franchise requirements for the provision of services, facilities and equipment". *House Committee Report*, p. 65.

[8] Section 542(c)(1)(D).

and a disruption of the entire balance of the statutory scheme to additionally deduct the cost of meeting community needs and interests from the franchise fee separately contemplated in Section 542. Determinations of "cable-related" community needs and interests are, under Section 546, part of each individual franchise renewal process, *not* to be derailed by a Commission determination that such requests must be paid for by the community itself out of franchise fees it would otherwise collect.

In short, if a particular cable-related needs and interest request by an FA is not "cable-related" or is an unreasonable request, given the community's future needs and interests, and the cost that would be incurred by the company in meeting those needs, then the FA would be legally prohibited from relying on the Section 542(c)(1)(D) criteria as a basis for denying an incumbent a franchise renewal.[9] The FNPRM thus mischaracterizes the statutory scheme as to incumbents in the above-quoted sentence from its ¶17.

2. New Entrants.

Citing ¶104 of the *First Order*, the FNPRM claims that "The Commission has determined that non-incidental costs required by LFAs must count toward the five percent franchise fee cap.[10] But that is a misstatement of what the Commission said in ¶104 of the *First Order*. What the *First Order* actually said was "…LFAs must count *such* non-incidental franchise-related costs toward the cap" [emphasis added].[11] The word "such" in that sentence in the *First Order* refers to its preceding findings about certain *monetary* payments (which the Commission determined did not fit within the definition of costs incidental to the awarding of a franchise). The

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[9] Indeed, Section 531, which authorizes FA requirements of PEG and I-Net capacity, expressly ties such requirements back to the renewal process: A franchising authority …. may require *as part of a cable operator's proposal for a franchise renewal, subject to section 546 of this title,* that channel capacity be designated for public, educational, or governmental use, and channel capacity on institutional networks be designated for educational or governmental use, and may require rules and procedures for the use of the channel capacity designated pursuant to this." Section 531(b).
[10] FNPRM, ¶18
[11] First Order, ¶104

same ¶104 in the *First Order* goes on to refer also to other types of requirements that are to be treated as "franchise fees", but these are all, as ¶105 of the *First Order* makes clear, "*unrelated to the provision of cable services by a new competitive entrant*" [emphasis added]. Indeed, ¶¶110 through 120 of the *First Order* makes it unambiguously clear that the Commission understood that cable-related franchise requirements, such as those for PEG channels and I-net capacity, would *not* be treated as "franchise fees".

The *First Order* did express a concern that were such requirements on new entrants to go beyond "reasonable" they could constitute potential impediments to desirable competition. But the First Order did not seek to resolve such concern by treating such requirements as "franchise fees". Instead, the *First Order* essentially created a comparable reasonableness test for such requirements when applied to *new entrants* to that already applicable to incumbents under the "cable-related community needs and interests taking into account costs" renewal standard, based on the "reasonableness" language in Section 541(a)(1). The *First Order* thus resolved the potential concern it identified, and found no need for the kind of statute-defying proposal the FNPRM now proposes. Indeed, the *First Order*'s concern would not have arisen in the first place if there was any understanding that requirements such as PEG or I-Net capacity requirements would be treated as "franchise fees" subject to the cap. Not only is the FNPRM's proposed ruling not supported by the precedent of the *First Order* as the FNPRM claims, the proposed ruling is directly contradicted by the precedent of the *First Order*.

To summarize, both incumbents and new entrants are *already* protected under the Cable Act against the supposed risk of unreasonable FA requirements, incumbents by Section 542(c)(1)(D) and new entrants by Section 541(a)(1) as further construed by the *First Order*. In both cases these existing protections themselves belie the notion that requirements such as PEG and I-Net capacity are "franchise fees" under Section 542 – if they were "franchise fees" subject to the cap, such protections would hardly have been considered necessary in the first place.

C. The FNPRM's Proposal Fails to Recognize The Value To The Public Of What It Proposes to Treat as "Franchise Fees".

The statement quoted on page 4 above from ¶17 of the FNPRM is also misleading in it sits reference to "free or discounted services *for LFAs*" [emphasis added], as if a requirement of a public access channel or free service to a school is "for" an FA as a corporate entity, distinguishable from the community the FA serves. That is a false characterization. Public, educational and governmental ("PEG") channels, and services to public institutions, are intended for the benefit of the community as a whole, not a state or local government as a corporate entity. And there is a potential benefit for cable operators as well, in that PEG channels are generally not available to non-cable subscribers, giving potential customers with particular interests additional incentive to subscribe, just as free cable service to schoolchildren offers the cable operator an opportunity to demonstrate the value of its services to a new generation. The FNPRM recognizes[12] the potential benefit to cable operators of buildout requirements (even buildout requirements to areas that the cable operator would not seek to serve on its own initiative as they may not be considered sufficiently profitable to justify the investment) Requirements expressly contemplated by Congress in and requirements of free service to public institutions, if they are agreed to by cable operators protected by the renewal provisions of Section 546, represent exactly the same kind of public-facing requirements as buildout requirements, all having been parts of the cable franchising process in the United States for more than 50 years.

[12] FNPRM, ¶21

Indeed, the very notion that the renewal provisions of Section 546 refer to "taking into the *costs* of meeting such needs and interests" makes even more clear that Congress never intended the costs of meeting "community needs and interests" requirements incorporated into franchise agreements to be treated as "franchise fees". Congress expressed here an intention that franchise requirements of various types, not merely buildout requirements, would seek to assure that benefits related to the cable system and to the cable operator's expertise ("cable-related community needs and interests") would redound to the benefit of a broadly diverse set of public interests, and that meeting such needs would impose *costs* on the cable operator, costs that would not be reimbursed by treating them as franchisee fees subject to the franchise fee cap. If Congress had here meant only "buildout requirements", it would have referred to "buildout requirements", not "cable-related community needs and interests".

D. <u>An Absence of Evidence is Not Evidence of Absence.</u>

If one searches for something in the wrong place, failing to find it there doesn't mean it doesn't exist. The FNPRM at ¶17 says: "We see no basis in the statute or legislative history for distinguishing between in-kind contributions unrelated to the provision of cable services and cable related, in-kind contributions for purposes of the five percent franchise fee cap." As already pointed out, the legislative history clearly shows that Congress contemplated that it is *monetary payments* that are to be treated as franchise fees, and thus there was no reason to contemplate a distinction between types of *non-monetary* requirements that were never contemplated in the first place to be part of the franchise fee definition.

Similarly, the FNPRM relies heavily on the absence of express exclusions from the definition of "franchise fee" in Section 542 for items such as PEG and I-Net capacity requirements. These arguments in the FNPRM are akin to finding that the rules of baseball do not preclude a baserunner driving around the bases in a car and concluding that therefore such a strategy must be permitted. For example, see ¶20 of the FNPRM:

> Section 622(g)(2) carves out only limited exclusions for PEG related costs—*i.e.,* PEG support payments required by any franchise granted prior to 1984 and PEG capital costs required by any franchise granted after 1984. Section 622(g)(2) makes no mention of an I-Net-related exclusion, nor does it contain a general exclusion for *all* PEG related costs. Since Congress enacted the PEG and I-Net provisions at the same time it added the franchise fee provisions, it could have explicitly excluded those costs in addressing the scope of the PEG-related costs in that subsection if it had intended they not count toward the cap. Based on this, we tentatively find that treating all cable related, in-kind contributions as "franchise fees," unless expressly excluded by the statute, would best effectuate the statutory purpose.

But the FNPRM fails to note the obvious reason why PEG capital grants are expressly excluded from the "franchise fee" definition while PEG and I-Net capacity requirements are not. PEG capital grants are *monetary* grants. Franchise fees are *monetary* in nature, and Congress sought to make sure that PEG capital grants, also being *monetary* and thus potentially treatable as franchises fees, were expressly *excluded* from the definition to make sure they were not *included*. In contrast, there was no need to expressly exclude PEG and I-Net capacity requirements from the franchise fee definition because Congress never imagined that such *non-monetary* capacity requirements would ever be treated as included, any more than baseball rules writers imagined players barreling around the basepaths in Honda Civics.

E. <u>Summary of Franchise Fee Issues.</u>

To summarize, the FNPRM has failed to meet the challenge that the *Montgomery County* court put to the Commission, and has indeed made matters only monumentally worse, without justification, by expanding an assumption that was already rejected by the *Montgomery County* court when the Commission presented its position in its narrower form. The City urges the Commission not to proceed with any of the proposed final rulings under the franchise fee portion of the FNPRM.

III. MIXED USE NETWORKS.

A. <u>The FNPRM Proposes Language That Overbroadly Describes The Scope Of Permissible Preemption Of FA Authority</u>.

The FNPRM fails to describe limits on the authority of FAs over non-cable services of a cable operator in a manner that falls within the parameters of the Commission's authority to adopt. An example of the FNPRM's failure, in its proposed findings to remain within the scope of Commission authority is found in ¶26: "We thus tentatively conclude that the mixed-use network ruling prohibits LFAs from regulating the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers, or from regulating any facilities and equipment used in the provision of any services other than cable services offered over the cable systems of incumbent cable operators that are common carriers."

B. <u>Provisions Expressly Reserving Authority of FAs Over Mixed-Use Networks</u>.

Contradicting this broad conclusion, provisions of the Cable Act expressly recognize the authority of FAs to regulate mixed-use networks, including by referring to the activities of "cable operators", a term which defines an entity, not a particular service, thus contradicting any conclusion that the Commission is authorized to broadly preempt FAs from exercising regulatory authority over non-cable services over mixed use networks.

For example, Section 551, which describes certain federal law obligations imposed on cable operators, with respect to both their cable service and "other services", regarding subscriber privacy, also includes subsection (g), providing: "Nothing in this subchapter [that is, the Cable Act as a whole] shall be construed to prohibit any State or any franchising authority from enacting or enforcing laws consistent with this section for the protection of subscriber privacy."

Also, Section 552(d)(2) provides "Nothing in this subchapter [again, referring to the Cable Act in its entirety] shall be construed to prevent the establishment or enforcement of any municipal law or regulation, or any State law, concerning customer service that imposes customer service requirements that exceed the standards set by the Commission under this section, or that addresses matters not addressed by the standards set by the Commission under this section".

And yet again, Section 552(a) provides that "a franchising authority may establish and enforce customer service requirements of the cable operator…."

Each of these provisions is incompatible with Commission authority to characterize any "mixed-use networks" decision as broadly as it proposes to do in the FNPRM.

C. The Franchise Fee Cap and Mixed-Use Networks.

Another example of a provision of the Cable Act that contradicts the FNPRM's broad statements of the limitation of FA authority over mixed-use networks is Section 542(b).

Suppose a cable franchise contract with a cable operator provides for a franchise fee of "4% of all gross revenues received by the cable operator from the cable system, but subject to 47 USC Section 542(b) to the extent such section is applicable."[13] Section 542(b) does *not* cap the franchise fee collectible under this provision at 4% of the cable operator's cable service revenue if it also generates internet access service or other non-cable-service revenue from its cable system. Thus, no final decision arising out of this FNPRM may properly conclude that such a reading of 542(b) is appropriate.

The primary operative language of Section 542(b) is as follows:

> *For any twelve-month period, the franchise fees paid by a cable operator with respect to any cable system shall not exceed 5 percent of such cable operator's*

[13] A franchising authority might wish, for example, to include such a franchise fee provision, or something similar, in all its franchises for the use of public rights-of-way by communications companies, as one way to assure that the same franchise fee standard is applied equally to all such franchisees.

gross revenues derived in such period from the operation of the cable system to provide cable services.

There is no limit anywhere to be found in this language regarding the assessment of franchise fees on non-cable service revenue from a cable system, so long as the resulting fee amount payable does not exceed 5% of cable service revenue.

Thus, for example, suppose a cable operator, in the use of its cable system, generates $1 million of cable service revenue and $0.5 million of internet access service revenue. And suppose the applicable cable franchise includes the franchise fee provision described in the preceding paragraph, so that the contractually required franchise fee is "4% of all gross revenues received by the cable operator from the cable system, but subject to 47 USC Section 542(b) to the extent such section is applicable." Section 542(b) would *not* limit the franchise fee payable in this case to $40,000 (that is, 4% of the $1 million generated in cable service revenue). Instead the franchise fee in this case *must* be calculated at no less than $50,000.

The total franchise fee without the Section 542(b) cap in this scenario would be 4% of $1.5 million, or $60,000. Under a frequently used interpretation of the Section 542(b), the cap would limit the fee to 5% of cable service revenue, that is, $50,000. But there is no reading of Section 542(b) that would limit the collectible fee in this case to $40,000 or any other amount below $50,000. In any final decision regarding the "mixed-use" issue, the Commission should make clear that if nothing else, a cap of $40,000 resulting in this scenario is incompatible with the unambiguous language of Section 542(b) described above, and should not allow any language that it uses to describe its understanding of the treatment of non-cable revenue to be construable otherwise.[14]

[14] The FNPRM seems to rely, at ¶26, on the notion that a combination of definitions at 47 USC Sections 153(11) and 522(7) somehow renders the terms "cable system" and "cable service" identical as a practical matter for some but not

D. Additional Flaws in the FNPRM's Approach to Mixed-Use Networks.

The FNPRM cites other provisions and supposed precedents for its proposed broadly stated findings that would ostensibly preempt FA authority over information services provided by cable operators generally. Comments submitted in this proceeding in response to the FNPRM by a wide range of distinguished groups that represent local governments across the United States have explained in detail the various flaws in the FNPRM's reliance on such sources for its proposed rulings.[15] The City endorses and urges the Commission to accept the points made on these matters in those accurately stated and thoughtfully expressed comments.

Respectfully submitted,

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all cable operators. If Congress intended in the Cable Act that the term "cable system" when used by any entity that uses any part of such system for a telecommunications service (i.e., a service subject to common carrier regulation), becomes synonymous with only the "cable service" the entity provides, it would have made no sense to refer in Section 541(b)(3)(C) to a "cable system" being "used for provision of a telecommunications service". In the Commission's proposed reading in the FNPRM, a "cable system" could not, by definition, be "used for provision of a telecommunications service". Clearly, Congress did not intend for 47 USC Sections 153(11) and 522(7) to interact in the manner that the FNPRM suggests. The City notes that in any event the Commission has no authority to apply the franchise fee cap uniformly to all cable operators if the language of the statute unambiguously requires a different application to some. The City also notes that in light of the Commission's decision to classify internet access service as an information service rather than a telecommunications service, for many cable operators the extent of any remaining "common carrier" activity is likely to be a minimal, even portion of its revenue. If the Commission intends to leverage its interpretation of the interaction of 47 USC Sections 153(11) and 522(7), which as noted above in itself is incompatible with the language of the Cable Act, to apply to every cable operator who generates even a tiny portion of its revenue from common carrier regulated service, it will be making a mockery of Congressional intent.

[15] See the collective Comments of the National Association of Telecommunications Officers and Advisors, the United States Conference of Mayors, the National Association of Counties, the National League of Cities, the National Association of Regional Councils and the National Association of Towns and Townships.